LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969

No. 913

EARL MISSLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Edward L. Genn
610 Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	5
Statement of the Case	5
Reasons for Granting the Writ	12
1. The Decision Below Directly Conflicts With the Decision of United States v. White, Recently Argued in This Court; and to the Extent That That Decision is Confirmed, Or That the Import of Katz v. United States Applies Here, This Petition Should Be Granted	12
2. The Decision Below Conflicts With the Principle and Rationale of Massiah v. United States and Presents Significant Questions Regarding the Basis Upon Which Indicted Defendants May Be Subject to Surreptitious Eavesdropping by Federal Agents Acting At the Instruction of the United States Attorney	19

Page

Clancy v. United States, 365 U.S. 313, 81 S.Ct. 645 ---------- 25,26
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 ---------- 27
Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261 ---------- 19
Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008 ---------- 21
Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 ---------- 14,16,18, 20,21
Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 ---------- 13,14,16, 17
Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424 ---------- 14,16,18
Lewis v. United States, 340 F.2d 678, 682 (C.A.8, 1965) ---------- 25,26
Leyra v. Denno. 347 U.S. 546, 74 S.Ct. 716 ---------- 19
Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381 ---------- 14,16,18
Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 ---------- 19,23
Massiah v. United States, 307 F.2d 62, 66 (C.A.2) ---------- 23
McLeod v. United States, 381 U.S. 356, 85 S.Ct. 1556 ---------- 20,21
On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 ---------- 14,16,18, 19

Page

Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429 ---------- 14,16,18
Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679 ---------- 15
Spano v. United States, 360 U.S. 315, 79 S.Ct. 1202 ---------- 19
United States v. Augenblick, 89 S.Ct. 528, 533 ---------- 27
United States v. Ronald Beatty, 282 F.Supp. 202 (D.C., Md.) ---------- 20
United States v. Johnson, 337 F.2d 180, aff'd on other gnds. 373 U.S. 169, 86 S.Ct. 749 ---------- 25
United States v. Lonardo, 350 F.2d 523 (C.A. 6, 1965) ---------- 27
U.S. ex rel O'Connor v. New Jersey, 405 F.2d 632 (C.A.3) cert.den. 89 S.Ct. 1770 ---------- 19,21
United States v. White, 405 F.2d 838, (7 Cir.) cert. granted 394 U.S. 957, 89 S.Ct. 1305 ---------- 13,14,16

Miscellaneous

Enker and Elsen, Counsel for the Suspect, 49 Minn. L.Rev. 49 ----- 22

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969

No.

EARL MISSLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Earl Missler, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on August 25, 1969.

OPINION BELOW

The Opinion of the Court of Appeals has been reported at 414 F.2d 1293., and appears in

the Appendix (1a-14a). No opinion was rendered by the United States District Court for the District of Maryland.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on August 25, 1969. A timely Petition for Rehearing was denied on October 10, (15a). On November 6, 1969, this Court entered an Order extending the time to file this Petition to and including December 4, 1969. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The Petitioner, Earl Missler, was convicted of obstruction of justice, in a non-jury trial, in the United States District Court for the District of Maryland. He was found guilty by Judge Northrop under an indictment which charged that he hired a third person (Vincent Ferrara) to kill or injure one Richard O'Keefe, who was Missler's co-defendant in an earlier and pending hijacking case in which both Missler and O'Keefe were charged with violation of Title 18, Sec. 659 and Sec. 2. The trial Court, relying upon certain eavesdropping testimony of F.B.I. agents for what it termed the "cornerstone" of the case, convicted the defendant on that testimony.

These agents, sent by the United States Attorney, were concealed in the home of the informant, Ferrara, and allegedly overheard certain highly damaging and incriminating responses of the Petitioner made to Mr. Ferrara, in relation to Mr. O'Keefe, the co-defendant.

The questions to be presented are:

1. Whether the case of United States v. White, No. 46 , cert. granted April 7, 1969, argued in this Court during the past month, controls, disposes of, or relates to all, or a portion of, eavesdropping aspects at bar.

2. Whether the testimony of the agents of the Federal Bureau of Investigation, sent with the approval or and at the instruction of the United States Attorney, for the express purpose of overhearing the conversation between the informant and the defendant, in the informant's home, was properly admitted against the defendant, or was in violation of the Fourth, Fifth, and/or Sixth Amendments, or calls for exercise of the supervisory powers of this Court, because of the federal officers and attorneys involved.

3. Whether, where the defendant has already been indicted, Massiah v. United States, or its underlying rationale, precludes the admission of any testimony of agents of the Federal Bureau of Investigation overhearing his conversations, where to defend against such testimony, the matters and issues regarding his

pending indictment are made a part of, or necessary to, that defense.

4. Whether Hoffa v. United States, as it relates to, or affects, the rights of indicted defendants, should be re-examined, and thereafter clarified, modified or reversed.

5. Whether those authorities, including Hoffa v. United States, which sustain the use of artifice, trick, or deceit by the Government or its informants in the obtaining of incriminating statements or words should be re-examined and thereafter limited or reversed, particularly when the action arises from the instructions or express approval of the United States Attorney.

6. Whether, where the Government concededly did not comply with the Jencks Act in an apparent inadvertent failure to turn over statements of a Government witness who testified at trial, until after trial, that failure can be deemed harmless under the Jencks Act because there was other impeaching cross-examination of the witness.

7. Whether the original handwritten notes of F.B.I. agents who are concealed witnesses to an alleged crime are producible under the Jencks Act, as direct memoranda of the "eyewitness," irrespective of whether they are verbatim or substantially verbatim; and, if so, whether the admittedly wilful destruction of these notes by the F.B.I., particularly after the admonitions in the instant Circuit in United States v. Johnson, 337 F.2d 180, 201-202, call for, or require a reversal or a further hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Set forth in the Appendix to this Petition are the pertinent constitutional and statutory provisions herein. They are The Constitution of the United States, Amendments IV, V and VI; and United States Code, Title 18, Section 3500 (The Jencks Act) and Section 1503 (Obstruction of Justice). See Appendix, 16a-20a.

STATEMENT OF THE CASE

On December 19, 1967, the Petitioner, Earl Missler, was indicted in two counts of a four count indictment for hijacking.[2/] The first two counts, in which Missler was not named as a participant, charged the hijacking and possession of a large quantity of television sets by

---

2/ Record references. References to the certified record in this "Statement of the Case" and "Reasons for Granting the Writ," which follows, are made to the Joint Appendix which was filed in the Fourth Circuit, by using the notation "JA". That Joint Appendix, certified here, appears to encompass the necessary record for the Petition. In some instances, references to the Opinion appearing in the Appendix to this Petition and its reported citation are also made, where appropriate.

certain co-defendants including Richard O'Keefe; the Third and Fourth Counts charged these same defendants, including Mr. Missler on this occasion, with the hijacking of a truckload of cigarettes at a different time and place (JA 6-9). That indictment formally charged federal violations under Title 18, U. S. Code, Section 659.

The evidence disclosed that on the date these hijacking charges were filed, December 19, 1967, Mr. Missler was arrested by the F.B.I., and shortly thereafter spoke with a Baltimore attorney regarding that arrest. (JA 187, 202).

It is undisputed that the docket entries in that proceeding reflect that within a few days, Mr. Norman Ramsey, and then Mr. Alan Murrell, both Baltimore lawyers, entered their respective appearances in the hijacking case on Missler's behalf (JA 15).

On January 16, 1968, four weeks later, Mr. Missler was indicted a second time for the matters which form the basis of the result here --- obstruction of justice --- in violation of Title 18, Section 1503. He was asserted to have colluded with one Vincent Ferrara after the hijacking indictment, and between January 2 and January 9, 1968, in an "endeavor" to do away with, or seriously injure, one of his co-defendants in the hijacking case, Richard O'Keefe. (See Indictment, Appendix to this Petition, 21a-22a; also cited in the Opinion below, footnote 1, 414 F.2d at 1296-1297; App. 4a-5a).

While the obstruction of justice indictment alleged that the arrangements between Ferrara and Missler took place "between" January 2, 1968 and January 9, 1968, the primary, or even sole, testimony which forms the basis of that charge, relates to events which allegedly occurred within a relatively few minutes on January 9, 1968, at the home of Vincent Ferrara.

The evidence shows that on that date, the two F.B.I. agents who, twenty days before, had in fact arrested Missler for the hijacking charge (Agents David Faulkner and Gail Cobb), were secreted in the upstairs area of the Ferrara home, to overhear the conversations which took place downstairs between Mr. Ferrara and Mr. Missler (JA 170-183).

While the testimony of the officers shows that they "first heard" about the alleged dealings between Ferrara and Missler regarding Mr. O'Keefe, about the "4th or 5th of January" (JA 183), they had not overheard, nor did they testify regarding any other alleged conversations between Ferrara and Missler. Thus, the crucial evidence provided by them was that summarized in the Opinion below relating to the events of January 9, 1968 (JA 169-192, Agent Faulkner; JA 193-214, Agent Cobb; App. 4a): "...the agents heard (Missler) confirm Ferrara's story about the agreement Missler had with him to have O'Keefe murdered." (Opinion, App. 4a). While the actual testimony of the agents largely shows that the "talking" was done by Ferrara, with apparently only an occasional response, or no response, by Missler, we must, and do, of course, accept

that summary of the import of the agents' testimony, for the purposes here. (Compare JA 169-214 with App. 4a).

The decision below correctly noted that as part of its "obstruction" case against Mr. Missler, the Government established the elements of the hijacking case by showing the July 5, 1967 theft of the cigarettes, the involvement of the defendants in that hijacking, and even a quarrel about Missler's complicity in the hijacking, between Missler and O'Keefe at Mr. Ferrara's home on December 15, 1967. (414 F.2d at 1295; App. 3a).

The Opinion also properly noted that while the informant, Mr. Ferrara, did testify, the District Court Judge rejected his evidence and considered only the testimony of the agents as the "cornerstone" of the case (App. 5a). In this regard, the record shows that Ferrara not only gave directly contrary, sworn testimony in the proceeding at a later time; but even after trial, he signed affidavits recanting his testimony and then, recanting his other affidavits. (App. 4a; JA 289-304A). Inevitably, therefore, the trial Court reiterated on at least three occasions that it was the agents' testimony which formed the "cornerstone" of the conviction, both at the conclusion of the trial, and at the hearing on Supplemental Motion after trial (JA 287-288; Tr. 763; JA 13). As the trial Court itself stated still later, in response to observations about Ferrara's credibility: "I would certainly agree with you that if I were relying on Mr. Ferrara alone,

"Missler, as far as I'm concerned, would be on the street ...." (JA 304A).

It is for these reasons, as the Opinion below indicates, that the conviction here turned on the constitutional or supervisory propriety of the presence of the F.B.I. on January 9, 1968, and their vital testimony about what they allegedly overheard at the Ferrara home without Missler's knowledge.

In this latter regard, the evidence admittedly shows that as Missler and Ferrara spoke, the agents took personal notes of the statements being eavesdropped, and thereafter destroyed them (JA 208-210, 213, 414 F.2d at 1304). The Opinion described the notes as "sketchy" and observes that upon their return to the office, the agents "immediately prepared a formal report of the occurences at Ferrara's residence" (414 F.2d at 1304; App. 12a). While the record certainly suggests a great deal more than merely "sketchy" notes (e.g., the notes were "checked" against and compared to the report form, JA 209, 213), we may again assume the accuracy of the Opinion's "sketchy" characterization for the purposes here.

The justification of the destruction of the notes was that they did so pursuant to a "common practice" (JA 213; 414 F.2d at 1304). The Opinion below, relying upon Section 3500 (e)(2) of Title 18, found that the destroyed notes of this January 9 meeting were not "substantially verbatim;" and hence not

producible under the Act. It did not consider the applicability of Section 3500 (e)(1). See 414 F.2d at 1305; App. 13a.

Of some further moment here, but of only a passing interest in the Court of Appeals' decision, was its observation that the agents, Messrs. Faulkner and Cobb "....reported the call from Ferrara to the United States Attorney who advised the agents to accept Ferrara's invitation." (414 F. 2d at 1296; App. 4a).

In fact, the record at the post-trial Supplemental Motion on August 15, 1969 was the first mention of that participation when the Assistant United States Attorney, Mr. Goetz, said this:

> "....As a matter of fact, Mr. Genn suggested, at least I got the impression that he was suggesting, that this was something that the F.B.I. did surreptitiously and unknown to the U.S. Attorney's office. This is not true.
>
> "Agents Faulkner and Cobb came to us and told us that Mr. Ferrara had called, and what he had told them, and that this conversation --- they expected this conversation to take place within fifteen or twenty minutes and could they go out there, and we said, yes, go, go and listen.
>
> "So they were there with the authorization of the United States Attorney's office." (Tr.39, August 15, 1968 hearing).

The Opinion mentions, but does not significantly deal with, the point pressed below regarding the constitutional or supervisory effect of this direct action by the United States Attorney in instructing Federal officers to eavesdrop upon an indicted defendant.

The final development was the Government's location of certain statements of a witness, Horace England, after the trial. (414 F.2d at 1303; App. 11a; JA 11-12). The Court's Opinion considered England so effectively impeached that the failure to deliver the missing Jencks statements was considered harmless error. Without quarreling with the Opinion's characterization of the cross-examination of England as "shattering," and thus the error harmless (414 F.2d at 1304), it neither considered the fact that the United States Attorney effectively argued England's credibility at trial (Tr. 576-584), nor whether any court can fairly substitute for the cross-examiner possessed with admittedly contradictory statements.

Represented at the time by Mr. Murrell, Mr. Missler was tried in a non-jury proceeding on the obstruction charge, and convicted by Judge Northrop on March 12, 1968, prior to any trial on the hijacking charges. He has been incarcerated on that conviction since that date.

Over a year later, in April of 1969, he was finally tried on the Third and Fourth Counts

of the original hijacking case before a jury. He was convicted of possession of the cigarettes under the Fourth Count (which is now on appeal); he was acquitted by the jury of the very complicity in the hijacking under the Third Count, which was contended here to be the motivation for his alleged plot against Mr. O'Keefe (JA 305-321; Reply Brief p. 4, footnote 1).

REASONS FOR GRANTING THE WRIT

In accordance with Rule 23(1)(h), requiring that the Petition set forth "direct and concise argument amplifying the reasons relied on for allowance of the Writ," and in an endeavor to be both succinct and spare, as this Court's rules and practice require, the Petitioner suggests the following reasons for the granting of the Writ:

1. The Decision Below Directly Conflicts With the Decision of United States v. White, Recently Argued In This Court: and to the Extent That That Decision Is Confirmed, Or That the Import of Katz v. United States Applies Here, This Petition Should Be Granted.

The Opinion below discussed at length the various theories and decisions of this Court and the respective Courts of Appeal relating to the

admissibility of evidence obtained through surreptitious eavesdropping by Government agents. (414 F.2d 1297-1300; App. 5a-10a). Among those it cited, were two cases directly related to the issues here: United States v. White, 405 F.2d 838 (7 cir.) cert. granted 394 U.S. 957, 89 S.Ct. 1305, and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507. As the decision at bar noted, White is applicable to and persuasive of the position of this Petitioner (414 F.2d at 1300, footnote 3; 414 F.2d at 1301; 414 F.2d at 1302, footnote 6; App. 8a-10a).

Petitioner is informed that this Court heard oral argument in White on November 10, 1969; and it may occur that the decision in that case will determine or dispose of certain issues here. Petitioner is also informed, however, to the extent that Katz applies to White, and is its supportive base, there is a question of the retroactivity of Katz in the White case that is not present here. Katz was decided on December 18, 1967. That date is one day before the arrest of the Petitioner, Earl Missler, on the hijacking charges, on December 19, 1967; it is 20 days before the crucial conversation eavesdropped upon by the Federal agents at bar, with the approval of, and at the instruction of, the United States Attorney.

White, however, involves conversations occurring in December of 1965. To the extent, therefore, that White does not reach the

issues noted here, it is urged that the decision below plainly conflicts with the underlying rationale of Katz and that that conflict should be resolved by this Court. Nor is this all. The Opinion of the Fourth Circuit reviewed what it considered to be certain of the pertinent decisions in regard to the positions taken below (414 F.2d at 1297-1302; App. 5a-10a). Those cases, in addition to Katz and White, are Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408; Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381; On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967; Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429; and Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424.

All of these authorities, of course, pre-dated Katz. Emphasized below by Petitioner were two points in Katz that could not be ignored in applying that ruling to the facts at bar: (1) Katz stated that the protections there given are to "people, not places," and (2) The evil complained of is the "uninvited ear." See Katz v. United States, supra, 88 S.Ct. at 511, noted in the Opinion below in this regard, 414 F.2d at 1298 (App. 6a).

The point is simply this: If Katz "holds" that our constitutional concern is with "people and not places," then the fact that Missler was at Ferrara's home is not dispositive here; and if our further constitutional concern is with the "uninvited ear," then whether the surreptitious

eavesdropping is electronic or direct is not the primary issue. Furthermore, we argued then, and we urge here, not Hoffa, not Lopez, not Lewis and not Osborn are persuasive in this regard because in each one of those cases, the testimony given and challenged was that of the person to whom the speaker addressed himself. In Hoffa, the informant Partin was like the informant Ferrara here. As this Court itself noted in Hoffa, "Partin did not enter the suite by force or stealth. He was not a surreptitious eavesdropper." (385 U.S. at 302, 87 S.Ct. at 413). But that is precisely the description of the agents at bar. They were surreptitious eavesdroppers. Partin was not. In commenting upon Lopez, Hoffa observed that the agent there, Mr. Davis "....was in the office with petitioner's consent and while there, he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge." (385 U.S. at 303; 87 S.Ct. at 414).

Again, that is precisely what the F.B.I. agents did here. They were at the premises without Petitioner's knowledge and they were "seizing something surreptitiously," i.e., "oral statements," within the meaning of Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679.

Let us recall this vital fact: The issue is not Ferrara; it is the F.B.I. agents; it is

the surreptitious, not the deceitful, we here consider; it is the "uninvited ear," not the ear to which an alleged "misplaced confidence" has been given; it is a person and not a place that is protected.

The Opinion below recognized the difficulty of relying on the "stratagem, trickery or misplaced confidence cases," (Hoffa, Lopez, Lewis and Osborn) for support of its decision on the facts; and it further saw that the closest case in factual point, On Lee, had its "decisional foundation" put "in question" by Katz (414 F.2d at 1300).

The Court of Appeals' decision at bar itself said that this was "(a) debate (which) is likely to remain unresolved until the Supreme Court furnishes additional guidance." (414 F. 2d at 1301; App. 9a).

If White does not reach these issues, then the Petition here should be granted to resolve the debate and the conflicts. The Opinion below did attempt to find an answer by concluding that it was of "(high) significance that the appellant (Missler) spoke, not in his own home, or in a public telephone booth, as Katz did, but in the home of Ferrara." (414 F.2d at 1302; App. 10a). The Opinion then reverted to support from the "misplaced confidence" cases to deny Petitioner protection, because Ferrara could have recorded the discussion, instead of using live, though secreted, "auditors." (414 F. 2d at 1302; App. 10a).

We think the observations to be made in this regard are clear: When the Opinion below, at page 1298, notes that it must be guided by the holding in Katz that the Fourth Amendment protects "people and not places," it takes but a short five pages of discussion for that same Opinion to conclude precisely the contrary --- to determine that it is where the surreptitious event occurs that is all the difference. (414 F.2d at 1302). Furthermore, we suggest that this "narrower ground of decision" rests upon a point having almost nothing to do with the special argument here --- the right of Ferrara to use surreptitious "live auditors," or unseen "third parties" to the conversation, and of Missler to expect it. Plainly, that matter is a question of credibility, of corroboration, of reliability, and of some private invasion of privacy --- in fact, of everything that the Fourth Amendment argument is not really about.

The Fourth Amendment argument is about Governmental intrusion. It is about Federal officers and what they did. It is not about Mr. Ferrara. It is not about whether he (Ferrara) had a right to corroborate himself by a recording device upon his person. It is not about whether he could therefore use, or invite "auditors" or "third parties" to witness the events. It is about what Ferrara's alleged "right" to invite, if it exists, may do to Missler's right to be free from Fourth Amendment violation by Federal officers. The Federal nature of those officers is all the difference. It is the difference under the

Fourth Amendment; it is the difference when this Court's supervisory powers are called upon. It is that factor --- that Federal factor --- that the Opinion and its rationale ignores.

Finally, we urge, that the Court of Appeals' Opinion suggests two important and related reasons for granting this Writ, implicit in some of the issues in White, but perhaps not necessarily to be considered here:

(1) At the very least a "magistrate" should have intervened in this surreptitious eavesdropping and a warrant obtained. The Opinion below rejects the view that an "invitation" to Federal agents, acting at the behest of the United States Attorney, to eavesdrop surreptitiously on an indicted defendant may be given "without prior authorization from a magistrate"(414 F.2d at 1302, App. 10a). We think that view is error; more significantly, we think it deserves consideration and examination by this Court. Compare Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429.

(2) If the "misplaced confidence" or "stratagem, trickery or deceit cases" (e.g., Hoffa, Lopez, On Lee, Lewis, and Osborn, and like cases) be authority for the actions taken at bar, then we think this Court ought to re-examine them, or clarify them, particularly where, either a warrant was not obtained, or an indicted defendant is being overheard; or, as here, where both conditions exist. We suggest that these authorities, if they are the decisional bases of the doctrines used to support this, or analogous,

factual cases, have denied the promise and prophylaxis implicit in Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261; Leyra v. Denno, 347 U.S. 546, 74 S.Ct. 716; and Spano v. United States, 360 U.S. 315, 79 S.Ct. 1202; and that, at the very least, wholly apart from constitutional claims, the supervisory powers of this Court over the participation of United States Attorneys in such eavesdropping, requires that review. See, Opinion of Mr. Justice Black, On Lee v. United States, 343 U.S. 747, 758.

2. The Decision Below Conflicts With the Principle and Rationale of Massiah v. United States and Presents Significant Questions Regarding the Basis Upon Which Indicted Defendants May Be Subject to Surreptitious Eavesdropping By Federal Agents Acting At the Instruction of the United States Attorney.

It was urged in the Fourth Circuit that in view of the fact that Mr. Missler was indicted and arrested on December 19, 1967, and had obtained counsel shortly thereafter, the surreptitious overhearing of his conversation with Mr. Ferrara violated the principles set forth in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, and Beatty v. United States, 389 U.S. 45, 88 S.Ct. 234, reversing 377 F.2d 181. See also: United States ex rel. O'Connor v. New Jersey, 405 F.2d 632 (C.A.3), cert. den.

89 S.Ct. 1770; McLeod v. United States, 381 U.S. 356, 85 S.Ct. 1556. See also: United States v. Ronald Beatty, 282 F.Supp.202 (D.C., Md.)

The Opinion rejected the applicability of this Court's decisions in Massiah and Beatty on this ground (414 F.2d at 1302; App. 10a):

> "Clearly, Massiah and Beatty are without applicability here. In both of those cases, the Government sought to use the defendant's self-incriminating post-indictment statements to prove the charge in the pending indictment. Here, by contrast, Missler was under indictment for hijacking, but the trial in which the statements were used was not for that offense. The agents' testimony was received in proof of a distinct and separate offense --- obstruction of justice --- committed after the hijacking indictment."

The decision below thus emphasizes that the agents' testimony here proved a "separate and distinct offense" --- obstruction of justice --- committed after the hijacking indictment, and that a similar argument was rejected in Hoffa v. United States. (414 F.2d at 1302-1303; App. 10a - 11a).

First of all, we suggest that the Opinion's own initial statement shows that the two cases were in fact intertwined in this testimony, when it points out, in the opening third and fourth paragraphs of the Opinion (414 F.2d at 1295; App. 3a), that the testimony of the Government

established the theft of the 565 cases of Kent Cigarettes, the involvement of Horace England and Richard O'Keefe (defendants as well in the hijacking case), and the earlier meeting of Missler in Ferrara's home, where O'Keefe accused Missler of complicity in the hijacking. Furthermore, it was essential in the defense presented by Missler to disprove the conversations, and to show, through exploration of the entire hijacking case, that Missler had no motive or reason to wish to do away with O'Keefe, because Missler was, in fact, not involved in that hijacking. Cf. Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008; U.S. ex rel O'Connor v. New Jersey, supra, at p. 638, footnote 20: "It is not whether the defendant made a knowing decision to testify, but why." Here, the testimony of the agents compelled defense proof regarding the hijacking to disprove it as a motive at bar.

The decision does indeed conflict with Massiah, Beatty, and McLeod. See O'Connor, supra, at 631.

There is, however, a still further, and stronger reason why this Court should review the matter and grant the Petition: The apparent support the Opinion found in Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408. (414 F.2d at 1303; App. 11a).

The present point is, of course, limited to a special, but significant, class --- the indicted defendant.

Indicted defendants properly have a protection from Governmental intrusion for a variety of reasons related in large part perhaps, to the privilege against self-incrimination and the right to a fair trial, as much as to the assistance of counsel.

It is a protection which is in addition to that provided for in the Fourth Amendment.

Massiah seemed to find that protection in the Sixth Amendment, broadly construed. Judge Ainsworth, the dissenting Judge in the Circuit Court case of Beatty v. United States, 377 F.2d 181, 194, saw a portion of it there and in the supervisory powers of the Court over Federal officers.

Perhaps, as some commentators suggest, the special Massiah-Beatty protections obtain from four interwoven sources: The background of the Fourth Amendment (unreasonable seizures), overlaid with the intent of the Sixth Amendment (the presence of counsel), against the import of the Fifth Amendment (a fair trial, due process and no self-incrimination), all of which should be enforced through the supervisory powers of Federal Courts over Federal officers. See Enker & Elsen, Counsel for the Suspect, 49 Minn. L.Rev. 49. See also Beatty v. United States, 377 F.2d 181, 194 (dissenting opinion).

What may be the constitutional or supervisory authority implicit in Massiah - Beatty is not important to our immediate purposes.

What is important is why this Court should re-examine whether Massiah - Beatty must be preserved in this type of case.

Agents Cobb and Faulkner were sent out to Mr. Ferrara's house at the "express direction" of the United States Attorney, to use the phrase of the Government's Brief, page 6, in the Court below. They were sent by these opposing counsel, Federal attorneys, to eavesdrop on the defendant, unseen by him. Even the Second Circuit's Opinion in Massiah would have considered that fact as perhaps dispositive (307 F.2d 62, 66).

Whether it calls for the supervisory powers of this Court or is rooted in a constitutional claim, if an indicted defendant is not protected from any surreptitious intrusion by Federal officers, where are there any boundaries to invading the preparation of his case? As now written, they are left to the wholly unrestricted discretion of Federal officers, who may "hope" that something will "turn up," as here, to justify the illegal intrusion of an indicted defendant; and if there are no "fruits," no one will be the wiser.

If this act is not condemned, it is not merely rhetoric to ask what will ever prevent the agents of the Government from invading the privacy of any person and, more particularly, one whose freedom is at stake in a pending criminal charge, from a surreptitious overhearing

of any and all discussions of that person with any other person whatsoever, in the firm knowledge and expectation that if nothing is "turned up," the invasion will go unnoticed.

We urge that the issue here relates to the actions of the United States Attorney and F.B.I. agents, however "well meaning." To allow this discretion to go unchecked, by at least a warrant, is to grant to Federal officers and attorneys an awesome power indeed.

Hoffa never dealt with this question, nor did it dispose of it, even by dicta, as the Court below seems to believe. And if it does, it ought to be clarified.

It is an important question and deserving of this Court's concern and decision.

3. The Decision Below Misinterprets the Applicable Provisions of the Jencks Act and Involves Significant and Recurring Problems Concerning the Destruction Of Notes by F.B.I. Agents.

It will be recalled that the agents here took notes of what they heard between Ferrara and Missler, while secreted upstairs in Ferrara's home, then returned to their offices, allegedly dictated an Interview Report, and thereafter, in accordance with a purported

common practice, destroyed their original notes (JA 209, 210, 213; 414 F.2d at 1304; App. 12a).

The Opinion below properly alluded to the admonition against this "practice" issued by the Fourth Circuit in United States v. Johnson, 337 F.2d 180, 201-202, aff'd on other grounds, 383 U.S. 169, 86 S.Ct. 729 (See 414 F.2d, 1304; App. 12a).

The applicable statute is, of course, Title 18, Section 3500, set forth in its pertinent parts in the Appendix (17a - 19a).

The Fourth Circuit concluded that the notes at bar would qualify under the Act "if they satisfy the requirements set out in 18 U.S.C., Section 3500(e)(2)," (414 F.2d at 1305; App. 13a).

The Opinion, finding that they were "sketchy" and not substantially verbatim, ruled that the "notes destroyed were not subject to demand under the Act.", (Id. at 1305; App. 13a).

This ruling raises questions of considerable moment in the interpretation of the Act.

Petitioner suggested below that this interpretation directly conflicts with Clancy v. United States, 365 U.S. 313, 314-315, 81 S.Ct. 645, 647 and Lewis v. United States, 340 F.2d 678, 682 (C.A. 8, 1965).

It conflicts with those decisions because it is they which show that the proper subsection that applies here is (e)(1) rather than (e)(2).

The necessity of preserving the original notes, as a "Jencks" matter, was not for their use against Ferrara; it was for the impeachment of the agents themselves, with their own recorded or written statements of what they observed.

That is precisely what must be kept under Section 3500(e)(1). See Clancy v. United States, supra, and Lewis v. United States, 340 F.2d 678, 682.

The F.B.I. agents themselves were direct witnesses here --- a decidedly different matter from what they are told by a witness from whom they receive second-hand information. In the former case, the notes are purely and simply their own written statements of what they observed, or heard, as direct eye or ear witnesses. And, there are no collateral issues, such as those in subsection (e)(2) cases. Subsection (e)(2), which demands a "substantially verbatim statement," attempts to protect the reporting witness or informant from errors of the note-taker. But here, our purpose is to obtain the "statements" of the note-taker himself.

This Court has suggested that "(in) some situations, the denial of a Jencks Act statement might be a denial of a Sixth Amendment right."

See United States v. Augenblick, 89 S.Ct. 528, 533. 3/

Other Circuits have enforced Jencks duties strictly. See United States v. Lonardo, 350 F.2d 523 (C.A. 6, 1965).

We suggest that with the advance of Brady v. State of Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196, and on the record here, showing the notes in question to be a "statement" under Section 3500 (e)(1), the proper remedy under subsection (d) should be considered by the Court to resolve this recurring difficulty.

Does not Brady suggest that a defendant cannot obtain the benefit of that which is spontaneously exculpatory unless the original notes are preserved?

It is, of course, no "answer" to say that an Interview Report was later made up. What a witness puts down on paper spontaneously and contemporaneously with an event he sees and hears, is all the difference between the admissible

---

3/ For similar reasons, the Opinion's handling of the England statements turned over after trial, warrants review. (414 F.2d at 1303-1304; App. 11a-12a). Were the proper standards applied in that resolution? Is not Chapman the proper test? See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824.

and inadmissible, between the "res gestae" and the calculated, between having time to "improve" the statements or responses, and taking them down without premeditation as they occur. In this case that crucial conversation could not have been effectively impeached any other way; and the Petitioner has a right to believe the agents knew it.

The resolution of the Court below in placing this matter under Section 3500(e)(2) was palpably wrong. But more significant to this Petition than that seeming error, is the fact that the issue raised by these facts is one of sufficient significance to serve as a still further and equally valid ground, or reason, for the granting of this Petition.

CONCLUSION.

For the various reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Edward L. Genn
610 Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

December 4, 1969

APPENDIX

UNITED STATES of America, Appellee,
v.
Earl MISSLER, Appellant.
No. 12757.

United States Court of Appeals
Fourth Circuit.
Argued June 10, 1969.
Decided Aug. 25, 1969.

Defendant was convicted before the United States District Court for the District of Maryland, Edward S. Northrup, J., of violating federal obstruction of justice statute, and he appealed. The Court of Appeals, Sobeloff, Circuit Judge, held that officers, who, without warrant, concealed themselves in informer's home at informer's invitation and overheard defendant make statements incriminating himself and saw him pay informer, who allegedly was hired by defendant to kill or injure person for purpose of preventing such person from testifying in criminal prosecution pending against defendant, did not violate any right of privacy of defendant protected by Fourth Amendment, and, thus, their testimony concerning what they saw and heard was properly admitted.

Affirmed.

1. Indictment and Information ⇐71

Sufficiency of indictment is to be determined by practical rather than technical considerations, and if it tells defendant all he needs to know for his defense, and does it so specifically that he will be in no danger of being put in jeopardy a second time, it is sufficient.

2. Indictment and Information ⇐71

That indictment charging defendant with endeavoring to obstruct justice by hiring another to murder or injure specified person for express purpose of preventing such person from testifying against defendant in criminal action "now pending" in federal district court, contained no allegation that defendant knew that intended victim would testify against him and recited that criminal action in which intended victim was to testify was "now pending" rather than "then pending" did not render indictment fatally defective. 18 U.S.C.A. § 1503; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.A.

3. Searches and Seizures ⇐7(1)

Deception may, in some circumstances, be employed in investigation of criminal activity without running afoul of Fourth Amendment. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐7(1)

Fourth Amendment protection extends only to situations in which complaining person had reasonable and legitimate expectation of privacy. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Although one can reasonably expect to be free from presence of government listeners uninvited by him in his own home, Fourth Amendment does not necessarily entitle him to indulge in same expectation when he enters home of another. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐7(27)

Informer may invite officers to his own home to witness or overhear crime which he anticipates will be committed therein, and officers may accept his invitation without prior authorization from magistrate. U.S.C.A.Const. Amend. 4.

7. Criminal Law ⇐394.5(3)
Searches and Seizures ⇐7(27)

Officers, who, without warrant, concealed themselves in informer's home at informer's invitation and overheard defendant make statements incriminating himself and saw him pay informer, who allegedly was hired by defendant to kill or injure person for purpose of preventing such person from testifying in criminal prosecution pending against defendant, did not violate any right of

privacy of defendant protected by Fourth Amendment, and, thus, their testimony concerning what they saw and heard was properly admitted in prosecution for obstructing justice. 18 U.S.C.A. § 1503; U.S.C.A.Const. Amend. 4.

8. Criminal Law ⇐412.2(1)

Right to counsel attaches upon indictment, and incriminating statements made by indicted defendants out of presence of counsel may not be admitted at trial to prove charge in indictment. U.S.C.A.Const. Amend. 6.

9. Criminal Law ⇐412(4)

Pendency of indictment for one offense does not immunize defendant from accountability for statements made after indictment in commission of another crime, nor does it shield him from testimony concerning them. U.S.C.A. Const. Amend. 6.

10. Criminal Law ⇐412.2(1)

Fact that defendant's incriminating statements out of presence of counsel were made after defendant had been indicted for hijacking did not preclude admission of such statements in prosecution for entirely distinct and separate offense of obstructing justice, which was committed after hijacking indictment. 18 U.S.C.A. § 1503; U.S.C.A.Const. Amend. 6.

11. Criminal Law ⇐627.7(3)

Statute authorizing defendant, following direct testimony of government witness, to obtain any pretrial statements of such witness which are in possession of government and which relate to such direct testimony was intended to provide defendants in federal prosecutions with opportunity for thorough cross-examination of government witnesses, thereby making constitutionally guaranteed right of confrontation more meaningful. 18 U.S.C.A. § 3500.

12. Criminal Law ⇐627.7(3), 1166½(1)

Violation of statute authorizing defendant, after direct testimony of government witness, to obtain pretrial statements of such witness in possession of government relating to witness' direct testimony is excused only in extraordinary circumstances, and unless it is perfectly clear that defense was not prejudiced by government's failure to produce such statements, reversal is indicated. 18 U.S.C.A. § 3500.

13. Criminal Law ⇐1166(1)

Effectiveness of defense counsel's cross-examination is highly relevant in determining whether defendant was prejudiced by reason of government's failure to disclose pretrial statements of government witness which are in possession of government. 18 U.S.C.A. § 3500.

14. Criminal Law ⇐1166½(1)

Failure of government to comply with Jencks Act on account of its inadvertent failure to produce certain pretrial statements of its witness was harmless error, in view of defense counsel's impeaching cross-examination of such witness and in view of fact that statements withheld differed from statements furnished by government only in minor details. 18 U.S.C.A. § 3500.

15. Criminal Law ⇐627.6(4)

Jencks Act did not require government to produce handwritten notes, which were made by FBI agents while they were listening to conversation between informer and defendant, which were used by agents in preparing formal report, and which they subsequently destroyed, where it was doubtful whether notes were "substantially verbatim recital of oral statement" made by informer, and statements of informer were made to defendant and not "to an agent of the government" as required by Act. 18 U.S.C.A. § 3500.

16. Criminal Law ⇐1168(2)

Refusal to exclude FBI agent, who overheard defendant's incriminating statements, and who had not yet testified from courtroom while other agent who overheard such statements, was testifying did not require reversal of obstruction of justice conviction, in ab-

sence of showing of actual prejudice. 18 U.S.C.A. § 1503.

17. Obstructing Justice ⇐16

Evidence that defendant was arranging to have prospective witness against him in hijacking prosecution murdered or injured was sufficient proof of an "endeavor", within statute providing criminal sanctions for endeavoring to obstruct justice. 18 U.S.C.A. § 1503.

See publication Words and Phrases for other judicial constructions and definitions.

Edward L. Genn, Washington, D. C. (Brown, Genn & Brown, Washington, D. C., on brief), for appellant.

Paul M. Rosenberg, Asst. U. S. Atty. (Stephen H. Sachs, U. S. Atty., and Clarence E. Goetz, Asst. U. S. Atty., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, and SOBELOFF and WINTER, Circuit Judges.

SOBELOFF, Circuit Judge:

This is Earl Missler's appeal from his conviction by District Judge Northrop, sitting without a jury, for violating the federal "obstruction of justice" statute, 18 U.S.C. § 1503. The indictment charged that he did "corruptly endeavor to influence, obstruct, and impede the due administration of justice" by hiring and paying sums of money to Vincent Ferrara to cause the murder of or serious injury to Richard O'Keefe.

The genesis of the alleged offense was in an earlier indictment against the appellant and others for hijacking a truck carrying a large quantity of cigarettes in an interstate shipment from Greensboro, North Carolina, to Brooklyn, New York. O'Keefe was one of Missler's co-defendants in that case, and he was expected to testify for the Government against Missler.

The Government offered testimony tending to establish the following: On July 5, 1967, 565 cases of Kent cigarettes were hijacked from an interstate shipment of P. Lorillard Company moving from Greensboro, North Carolina, to Brooklyn, New York. The Federal Bureau of Investigation began an investigation of the theft which led to the arrest in October, 1967, of Horace England and Richard O'Keefe. The investigation continued following these arrests.

On December 15, 1967, Missler and O'Keefe met at the home of Vincent Ferrara. On that occasion Missler and O'Keefe quarreled; O'Keefe angrily accused Missler of falsely denying complicity in the hijacking, and warned him that "if I go away [to jail], you know we're all going to go away."

Just four days later, on December 19, 1967, appellant Missler and O'Keefe were both indicted. Indicted with them were Horace England, William Harmatz and Milton Kind. Missler was arrested on the same day at his home by F.B.I. Special Agents David E. Faulkner and Gail T. Cobb. It is undisputed that before taking Missler to the F.B.I. office, the agents informed him of the charges, gave the required *Miranda* warnings, and permitted him to make a telephone call. The officers and their prisoner then repaired to the F.B.I. headquarters. The transcript of Agent Cobb's testimony on direct examination contains the following:

Q. Now, what, if anything, sir, happened on the trip to the F.B.I. office?

THE WITNESS: (Agent Cobb) I was sitting in the back seat with Mr. Missler. David Faulkner was driving. At some time en route to the F.B.I. office, Mr. Missler asked if he could—if I would tell him one thing, and I said if I could.

He asked the question, did O'Keefe tell you I was involved in this case?

I said, I can't tell you that. I will tell you, the F.B.I. can't go around arresting someone on one individual's say-so alone, it has to be corroborated.

Mr. Missler nodded his head and said, you've answered my question.

After processing, Missler was released on bond. Eight days later, on December 27, 1967, according to the testimony of Ferrara, Missler met with him for the purpose of discussing the elimination of O'Keefe, the prospective government witness against Missler. They agreed that Ferrara would arrange for the sum of $4,000 to have O'Keefe killed. No money changed hands on that date, but during the first week of January, 1968, Missler made payments of $1,000 and $500 to Ferrara.

On January 9, 1968, Ferrara phoned the F.B.I. about the O'Keefe "contract." Ferrara informed Agents Faulkner and Cobb that he expected Missler to visit him that morning for the purpose of making an additional payment, and he invited them to come to his home. The agents reported the call from Ferrara to the United States Attorney who advised them to accept Ferrara's invitation. Accordingly, they went to Ferrara's and secreted themselves at the head of the stairs leading to the second floor. Missler arrived soon thereafter, and the agents heard him confirm Ferrara's story about the agreement Missler had made with him to have O'Keefe murdered. In the course of the conversation, Missler paid Ferrara an additional $500, warned him that O'Keefe carried a gun, and promised that he would take care of Ferrara's family if anything happened to him. At trial Ferrara testified to this conversation, and Agents Cobb and Faulkner corroborated him in all respects.

Taking the stand in his own behalf, appellant denied ever having arranged with Ferrara for the killing of O'Keefe. His version was that there was an agreement between O'Keefe, Ferrara and himself to "shake down" Harmatz, a co-defendant in the hijacking case, for a sum of money in return for assurances that they would not implicate him in the hijacking. Missler admitted having given Ferrara $500 in the course of the January 9, 1968 meeting at Ferrara's home as Ferrara and Agents Cobb and Faulkner had testified. Missler's explanation, however, was that this was a division of the proceeds of the shakedown of Harmatz, not a payment on a contract on O'Keefe's life. Numerous character witnesses were also called by the defense; and the Government offered O'Keefe and England as rebuttal witnesses to substantiate its theory of the case.

At the conclusion of the testimony, the District Judge found appellant guilty. Sentencing was deferred pending defendant's motion for a new trial. The motion was denied on August 15, 1968, and a maximum sentence of five years was imposed. Another motion for new trial, this one on the ground of newly discovered evidence, was filed by appellant, and the District Judge ordered an evidentiary hearing, which was held on March 6, 1969. Conflicting affidavits were submitted for the court's consideration. In one of these, dated November 27, 1968, and offered by the defendant, Ferrara asserted that his testimony at trial had been false and that Missler never hired him to arrange for the killing or injuring of O'Keefe. In the other affidavit, dated January 29, 1969, and offered by the Government, Ferrara affirmed the truth of his trial testimony and repudiated his affidavit of November 27, 1968, declaring it not "a true statement of the facts." Following the hearing, the District Judge denied the motion.

In this court appellant has advanced a number of grounds for reversal, but after full consideration, we affirm his conviction.

I. *Sufficiency of the Indictment*

Preliminarily, we deal with appellant's contention that the indictment fails to charge a violation of 18 U.S.C. § 1503.[1]

1. The indictment charges:

That from on or about the 2nd day of January, 1968, to and including on or about the 9th day of January, 1968, in the State and District of Maryland, Earl Missler did corruptly endeavor to influ-

The defects complained of are that (1) the indictment contains no allegation that the defendant knew that O'Keefe would testify against him at the hijacking trial, and (2) it alleges that Criminal Action Number 27887 was *now* (the date of the indictment for obstruction of justice), rather than *then* (the date of the acts constituting the present offense), pending in the United States District Court for the District of Maryland.

[1] We are of the opinion that these are not fatal infirmities. This court, speaking through Judge Rose, in Martin v. United States, 299 F. 287 (4 Cir. 1925), stated the rule followed in this circuit in determining the validity of an indictment:

> The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical, considerations. Does it, under all of the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held good. * * *

[2] Applying this rule, we have no difficulty in sustaining the indictment, for it contains a sufficient statement of the acts said to constitute the offense. Rule 7(c) Fed.R.Crim.P. The forbidden purpose—"preventing said Richard O'Keefe from testifying"—is stated unambiguously. It is inconceivable that the indictment did not put the appellant on notice of the specific nature of the charge against him, or that he was in the slightest degree misled by the use of the word "now" instead of "then." Indeed, we are not prepared to agree with appellant that the indictment failed to state an offense in using the word "now," for an endeavor to obstruct justice could as readily be made in anticipation of an indictment as during its pendency. In any event, no modern criminal court would be warranted in setting aside a conviction on account of such extremely technical deficiencies, which could have had no practical bearing on the defendant's awareness of the accusation or his ability to prepare his defense.

II. *Admissibility of the Testimony of Agents Faulkner and Cobb*

In the District Court, Missler's primary contention was that the testimony of Agents Faulkner and Cobb, which the District Judge termed the "cornerstone" of the Government's case, was unconstitutionally obtained and improperly admitted at trial in violation of his rights under the Sixth Amendment to the Constitution. In his reply brief in this court, though not earlier, the appellant advanced the additional claim that his rights under the Fourth Amendment were contravened by the manner in which the agents obtained the information concerning his January 9 conversation with Ferrara, and by their testifying in respect to that conversation. We proceed to a discussion of these two related claims.

A. *Fourth Amendment*

Appellant challenges the agents' testimony as the fruit of a violation of the Fourth Amendment's prohibition against

ence, obstruct and impede the due administration of justice in the United States District Court for the District of Maryland in that the said Earl Missler: (a) did hire one Vincent Ferrara to cause the murder of or serious injury to one Richard O'Keefe; (b) did pay to Vincent Ferrara on or about January 2, 1968, the sum of $1,500.00 and on or about January 9, 1968, the sum of $500, and on January 9, 1968, did undertake and promise to pay the said Vincent Ferrara an additional $2,000.00, said payments and promise for the purpose of hiring Ferrara to cause the murder of or serious injury to the said Richard O'Keefe. The aforesaid conduct by the Defendant Missler was with the intention and for the express purpose of preventing said Richard O'Keefe from testifying against the said Earl Missler in Criminal Action Number 27887 *now* pending in the United States District Court for the District of Maryland. (Emphasis added.) T. 18, U.S.C. § 1503.

unreasonable searches and seizures. His argument is that the agents should not have entered Ferrara's home without first obtaining a warrant authorizing them to overhear the incriminating conversation, and for this he relies principally on the Supreme Court's decision in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In that case, federal agents, proceeding upon probable cause, but without a warrant or the consent of either party to the conversation, placed an electronic device on the roof of a public telephone booth for the purpose of monitoring Katz's end of the conversation. The "bug" did not reach the telephone wires or physically trespass into the booth, but recordings of incriminating statements were made and introduced at trial over objection.

The Supreme Court ruled that

> [t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. 389 U.S. at 353, 88 S.Ct. at 512.

Overruling the "trespass" doctrine announced in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942), the Court observed that Katz sought to exclude the "uninvited ear" and noted that "the Fourth Amendment protects people, not places." Under the abandoned doctrine, wiretapping or eavesdropping accomplished without physical trespass of the defendant's premises had been held not prohibited by the Fourth Amendment. In *Katz*, a violation of constitutional rights was found despite the absence of a technical trespass.

In the instant appeal, appellant's position seems to be that he, like Katz, was "entitled to assume that the words he utter[ed] [would] not be broadcast to the world" and that the agents' conduct "violated the privacy upon which he justifiably relied." 389 U.S. 352, 353, 88 S.Ct. 512. In short, the argument is that Missler's expectation of freedom from governmental intrusion in Ferrara's home is analogous to that of Katz in the public telephone booth. The Government's position, on the other hand, is that Ferrara had the right to invite whomever he pleased into his home and that the appellant therefore was not entitled to assume the privacy of the conversation would be preserved. No right of Missler's protected by the Fourth Amendment is involved in this case according to this argument.

Both parties have cited cases in support of their respective contentions, but none possesses precisely the factors present here. It is not possible to derive from those decisions an all embracing rule. At best, we can only reach for an answer in this case by noting analogies to and distinctions from earlier ones. The process is made difficult by the fact that each time one finds a parallel there also appears a dissimilarity, leaving no basis for exact categorization.

Initially it should be noted that *Katz* involved electronic eavesdropping which this case does not. Electronic eavesdropping is perhaps more obnoxious. With the use of electronic equipment, as in *Katz*, the potential for the invasion of privacy is more ominous. Placing a "bug" carries with it the likelihood of intrusion more extensive in time and affecting many more persons than listening with the unaided ear. However, a more fundamental difference is that neither party to the conversation in *Katz* consented to the overhearing by the Government, whereas here Ferrara invited the agents to *his* home to listen. *Katz*, therefore, involved a surreptitious electronic interception of the conversation of two unconsenting parties, and the distinctly offensive nature of this governmental action underlay its condemnation by the Court. In the instant case, Agents Faulkner and Cobb merely accepted Ferrara's invitation to his home,

and they overheard without aid of an electronic instrument.

The Government relies heavily on Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). In that case a government informer named Partin overheard the incriminating statements of petitioner Hoffa while in the latter's hotel suite at his invitation. Partin testified to these at trial, and Hoffa argued that this testimony stemmed from a violation of his Fourth Amendment rights. The argument pressed was that Partin was in a position to overhear the incriminating statements only because he failed to disclose his allegiance to the Government; thus, Hoffa's submission was that his consent to Partin's presence was involuntary in the sense that it was induced by a deceitful non-disclosure.

The Supreme Court disagreed, holding that Partin's testimony had been properly received. The basis of the Court's conclusion was stated in terms pertinent here:

> The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. * * *
>
> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. 385 U.S. at 302, 87 S.Ct. at 413.

The Government's view is that our appellant, like Hoffa, was merely a victim of misplaced confidence, and therefore may not prevail on Fourth Amendment grounds. It contends that, just as Hoffa could not complain of Partin's betrayal, appellant is foreclosed from challenging Ferrara's action in inviting the agents to his home. The parallel is appealing, though it must be acknowledged that the *Hoffa* holding validated only the testimony of the informer, not that of third parties like Agents Faulkner and Cobb—an issue that did not arise in that case.

The Government also draws attention to Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), in which the appellant attempted to bribe an Internal Revenue Agent named Davis. The latter reported the illegal offer to his superiors, and they instructed him to wear a hidden electronic device when he would next meet with Lopez. This was done, and a recording of their conversation was made and introduced at trial to corroborate Davis' testimony. The Court, upholding the admission of the recording, stated its conclusion as follows:

> We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording. 373 U.S. at 439, 83 S.Ct. at 1388.

An analogy may be drawn between *Lopez* and the present case, notwithstanding the obvious factual difference that here no electronic device was employed. It may well be considered that if a man assumes the risk that the person with whom he holds a conversation will secretly record it for later production at a trial, he no less risks the possibility that the person in whom he confides will act, as Ferrara did, to arrange for live auditors who will later repeat the conversation as first hand, though unrecorded corroborative testimony.[2]

We have considered On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952), cited by the prosecution, where an informer named Chin Poy

2. In Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966), on facts strikingly similar to *Lopez* except that the agents proceeded there under the authority of a warrant, the Court upheld the electronic recording. The Court had no occasion to consider whether a warrant is necessary in eavesdropping cases in which one of the parties has consented to the overhearing, and it said nothing in contravention of its decision in *Lopez*.

transmitted his conversation with the defendant by use of an electronic device hidden on his person. On Lee was unaware of the recording device or that a government agent was on the receiving end of the transmission. At trial the agent testified as to what he heard, but Chin Poy was not called. In this respect *On Lee* went further than *Lopez*, where the recording was admitted only as corroboration of a government witness. The Court in *On Lee* nevertheless held that the agent's testimony had been constitutionally obtained and properly admitted.

It is noteworthy that while *On Lee* involved a secret *electronic* transmission by a participant in a conversation to agents waiting at a different location, here, by contrast, it was unnecessary for Agents Cobb and Faulkner to use an electronic device. They were within earshot of the conversation by virtue of an invitation from the master of the house.

If *On Lee* is still good law, it goes far to support the Government's position here, but it must be recognized that the authority of that decision has been put in question by the Supreme Court's action in *Katz*, overruling *Olmstead* and *Goldman*, the decisional foundation of *On Lee*.[3]

In Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), a quantity of narcotics was sold by the defendant in his home to an undercover agent who had falsely represented himself to be a narcotics user. The Supreme Court held that the narcotics were constitutionally obtained and therefore admissible in evidence. It squarely rejected the argument that because the defendant's invitation of the agent to his home was induced by deception it could not be deemed a waiver of his Fourth Amendment rights.

[3] *Lewis*, like *Lopez* and *Hoffa*, is an illustration of the general principle that deception may, in some circumstances, be employed in the investigation of criminal activity without running afoul of the Fourth Amendment. To this limited extent, it is relevant to the present inquiry.

The question before us, however, is not the same as in *Lewis*. Lewis' transaction was with an undercover agent and only he testified; there was no offer of testimony of eavesdropping third parties uninvited by the defendant. Here the crux of the controversy is the legitimacy of the presence of such third parties and their testimony as to what they overheard from the unsuspecting appellant's lips.

We see, then, that the Supreme Court has repeatedly sustained the admission of evidence obtained by deception in cases involving government informers. At the same time, the Court has been at pains to emphasize that eavesdropping and its attendant potential for grave intrusion upon the rights of the citizenry must be scrutinized carefully to prevent frittering away of those rights. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). In the present case we have a betrayal by an informer, with the added feature of deception by the surreptitious introduction of eavesdroppers who testified to what they overheard. How are the decisions to be synthesized and applied here?

The cases in which lower federal courts have considered the constitutionality of eavesdropping consented to by one of the parties to the conversation have involved the use of electronic means. The decisions in these cases are in conflict.

3. A majority of the Seventh Circuit, sitting en banc, recently refused to follow *On Lee*, expressing the view that "[t]he overruling of these cases [*Olmstead* and *Goldman*] combined with the reasoning of *Katz* leaves no scope for *On Lee*'s teaching." United States v. White, 405 F.2d 838, 848 (7 Cir.), cert. granted, 394 U.S. 957, 9 89 S.Ct. 1305, 22 L.Ed.2d 559 (1969). The decision of the Supreme Court in *White* next term is likely to clarify the status of *On Lee*.

A number of them have expressed the opinion in convincing fashion that *Katz*, in which neither party to the conversation consented to being overheard by outsiders, should not be distinguished from cases in which one of the parties has agreed to the eavesdrop, and that a warrant should be required in such instances as it was in Katz.[4] Their reasoning is that "[t]he crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker." United States v. White, 405 F.2d 838, 843 (7 Cir.), cert. granted, 394 U.S. 957, 89 S.Ct. 1305, 22 L.Ed.2d 559 (1969).

Other courts, with equal force and eloquence, have expressed the opinion that *Katz's* requirement of a warrant does not apply if either party is cooperating with the law enforcement officials.[5] The rationale underlying this view was well articulated in the dissent of Chief Judge Castle in *White:*

> Unlike *Katz*, the instant case involves not a search and seizure, but a misplaced confidence—not surreptitious eavesdropping, but merely the obtaining of evidence of a conversation in which the Government, through its informer, was a participant. See Lopez v. United States, 373 U.S. 427, 439, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963). Had the person on the other end of the telephone line in *Katz* allowed a Government agent to listen in on the conversation, there would have been no constitutional violation. Rathbun v. United States, 355 U.S. 107, 111, 78 S.Ct. 161, 2 L.Ed.2d 134 (1957); United States v. Williams, 311 F.2d 721, 725 (7th Cir. 1963), cert. den. 374 U.S. 812, 83 S.Ct. 1703, 10 L.Ed.2d 1035 (1963). Thus, once the conversation is deprived of its private character through the consent of one of the parties thereto, the Fourth Amendment, not having prohibited the initial exposure, does not prohibit the introduction into evidence of the conversation as transmitted or recorded. * * *
>
> Thus, any expectation, by defendant, of privacy, when the person to whom the defendant is speaking consents to exposure of the conversation is not reasonable and therefore not protected by the Fourth Amendment. 405 F.2d at 850.

This debate is likely to remain unresolved until the Supreme Court furnishes additional guidance. In this regard, we note that certiorari has been granted in *White*. In the case before us, the parties disagree as to the effect of Ferrara's consent. Appellant suggests that we adopt the position taken by the majority in *White*, while the Government urges us to follow the decisions to the contrary.

[4] We think, however, that to decide the instant case we need not lay down a broad general rule regarding the effect of a single party's consent without regard to other circumstances. A narrower ground of decision is available. As the parties seem to agree, and we think correctly, *Katz* teaches that Fourth Amendment protection extends only to situations in which the complaining person had a reasonable and legitimate expectation of privacy. It is necessary, therefore, to appraise the reasonableness and legitimacy of Missler's expectation in light of the surrounding circumstances.

[5] It is arguable that the present appellant's expectation of privacy was not less reasonable than Katz's, and the question is not free from doubt. How-

4. United States v. White, 405 F.2d 838 (7 Cir.), cert. granted, 394 U.S. 957, 89 S.Ct. 1305, 22 L.Ed.2d 559 (1969); United States v. Jones, 292 F.Supp. 1001 (D.D.C.1968).

5. United States v. Kaufer, 406 F.2d 550 (2 Cir. 1969), aff'd on other grounds, 394 U.S. 458, 89 S.Ct. 1223, 22 L.Ed.2d 414 (1969); Holt v. United States, 404 F.2d 914 (10 Cir. 1968); Dancy v. United States, 390 F.2d 370 (5 Cir. 1968), a divided court, Judge Fahy dissenting.

ever, we think it of high significance that the appellant spoke, not in his own home, or in a public telephone booth, as Katz did, but in the home of Ferrara. If Ferrara had somehow managed to secrete agents in appellant's home without the latter's knowledge, we would have a very different case. All would agree that in his own home one can reasonably expect to be free from the presence of government listeners uninvited by him. It does not necessarily follow, however, that the Constitution entitles one to indulge in the same expectation when he enters the home of another.[6]

[6, 7] The Supreme Court decisions in *Hoffa* and *Lopez* demonstrate that a person assumes risk of betrayal when he confides in another. The form of the betrayal in these adjudications may differ somewhat from Ferrara's here, but we incline to think the underlying principle is the same. When appellant went to Ferrara's home and there incriminated himself, he took the chance that Ferrara would testify against him, as Partin did against Hoffa; he also risked the possibility that Ferrara was recording the conversation, as Davis had done in *Lopez*. It fairly follows, we think, that he also assumed the risk that Ferrara, in his own home, might choose to secrete witnesses rather than rely on an electronic instrument to witness the incriminating transaction. Ferrara's conduct, to be sure, was a gross violation of the canons of ordinary hospitality. However, the standard we are to apply is not measured in terms of social etiquette due by a host to his guest; the question is one of constitutional dimension. If resort to electronic means to provide corroboration of the informer's testimony is not forbidden, we think it is not unduly stretching the matter to hold that the informer may invite officers to his own home to witness or overhear a crime which he anticipates will be committed therein, and that the officers may accept his invitation without prior authorization from a magistrate. We are persuaded on balance that no right of privacy protected by the Fourth Amendment was contravened here.

B. *Sixth Amendment*

[8] Appellant relies on Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and Beatty v. United States, 377 F.2d 181 (5 Cir.), rev'd, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed. 2d 48 (1967), in support of his claim that admission of the agents' testimony concerning his conversation with Ferrara, occurring in the absence of counsel, denied him his Sixth Amendment right to the assistance of counsel. The cited cases establish the general proposition that the right to counsel attaches upon indictment and that incriminating statements made by indicted defendants out of the presence of counsel may not be admitted at trial to prove the charge in the indictment.

[9] Clearly, *Massiah* and *Beatty* are without applicability here. In both of those cases, the Government sought to use the defendant's self-incriminating post-indictment statements to prove *the charge in the pending indictment*. Here, by contrast, Missler was under indictment for hijacking, but the trial in which the statements were used was not for that offense. The agents' testimony was received in proof of a distinct and separate offense—obstruction of justice—committed after the hijacking indictment. We find nothing in *Massiah* or

6. We are advertent to the fact that in United States v. White, 405 F.2d 838 (7 Cir.), cert. granted, 394 U.S. 957, 89 S.Ct. 1305, 22 L.Ed.2d 559 (1969), the transmitted conversations "occurred in the defendant's home, automobile, and place of business as well as in the informer's automobile and home." The court did not distinguish between these conversations on the basis of their respective locations, but it is possible that the court considered the invasion of the privacy of the defendant's home a sufficient ground for reversal, irrespective of the legality of what occurred on premises under the informer's control. If so, the court may have deemed it unnecessary to distinguish between the two sets of conversations.

Beatty to support the reading contended for by appellant. The pendency of an indictment for one offense does not immunize a defendant from accountability for statements made after indictment in the commission of another crime, nor does it shield him from testimony concerning them. The cited cases forbid officers of the Government to elicit statements, out of the presence of counsel, from persons under indictment, and then to use those statements to convict them of the charges for which they were under indictment. They do not lay down a rule that persons under indictment may not be overheard and their statements repeated if the statements are of the nature of this appellant's—verbal acts constituting an additional offense, not the one for which they were previously indicted.

An argument similar to appellant's was rejected in Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). We referred to that case earlier in discussing appellant's Fourth Amendment claim. The petitioner there was challenging his conviction for jury tampering. The jury in question had not been able to reach a verdict as to petitioner's guilt or innocence on certain Taft-Hartley law charges. As already noted, the conviction under attack was upon the testimony of Partin who had been present during many conversations between the petitioner and the attorneys defending him against the Taft-Hartley charges. One of the contentions pressed by petitioner was that his conviction for jury tampering could not stand because his right to counsel had been violated by the surreptitious invasion of the defense camp by Partin, an agent of the Government.

[10] The Supreme Court rejected the argument after assuming there had been an intrusion upon the defendant's relationship with his attorneys. The Court pointed out that the intrusion would have been ground for setting aside a conviction, if one had resulted, for the Taft-Hartley offenses, but furnished no basis for reversal of a conviction "on other and separate charges against the same defendant." Similarly, if we assume for the sake of the argument that appellant's right to counsel was infringed, this would be true only as to the then pending hijacking prosecution, and he is not entitled to suppression of evidence bearing upon an entirely new, subsequent offense.

III. *Alleged Violations of the Jencks Act*

Appellant next contends that the Government's failure to comply fully with the Jencks Act, 18 U.S.C. § 3500, necessitates reversal of his conviction. He claims that the Act was violated in two respects, and we deal with them separately.

A. *Pre-trial Statements of Witness England*

Horace England, one of appellant's co-defendants in the hijacking case, testified for the Government in rebuttal. England had been questioned by the F.B.I. on a number of occasions before appellant's trial, and made statements which were concededly Jencks material. Upon request by defense counsel, the Government, proceeding in good faith, produced what it thought were all of England's pre-trial statements. However, the government attorneys inadvertently overlooked two items and failed to furnish them to appellant. Admitting error in this failure, the prosecution maintains nevertheless that the appellant was not prejudiced thereby and that the conviction should not be set side on that account.

[11, 12] The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain

the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. See Killian v. United States, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961); Rosenberg v. United States, 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.

[13, 14] Applying this strict standard, we conclude that the error complained of in this respect was harmless. England testified very briefly as a rebuttal witness for the prosecution. He corroborated the testimony of Ferrara as to appellant's involvement in the hijacking. On cross-examination, the defense attorney vigorously interrogated him as to his numerous interviews with the F.B.I. and exposed the conflicting statements he had made. During this questioning, England reluctantly admitted having lied to the F.B.I. on at least seven occasions. The effectiveness of defense counsel's cross-examination is highly relevant in determining whether there was prejudice by reason of the Government's nondisclosure, and here there can be no doubt that England's credibility was very seriously impeached. Furthermore, the statements withheld differed from the statements furnished only in minor details. It would be sheer speculation to suggest that these differences, if known to defense counsel, would have resulted in material improvement upon the shattering cross-examination he was able to achieve without knowledge or use of the statements in question. We therefore conclude that the Government's failure to furnish them does not warrant reversal.

B. *Destruction of Notes by Agents Faulkner and Cobb*

[15] As Agents Faulkner and Cobb, unobserved, listened to the conversation between appellant and Ferrara at the latter's home, they made sketchy handwritten notes. These notes contained an abbreviated version of the conversation. Returning to the F.B.I. offices, the agents immediately prepared a formal report of the occurrences at Ferrara's residence. In the preparation of this report, they relied on their memories and on the notes. After satisfying themselves that their report was a full and accurate statement of the day's events, they destroyed the notes. The only explanation offered was that destruction of notes of this nature was a "common practice."

Appellant contends that these notes were Jencks material which the Government was under an obligation to produce. He claims that without them he could not effectively cross-examine the agents and suggests that it is impossible for the court to be certain that the agents did not, in the preparation of the formal report, improve upon their notes. We do not join in this insinuation, but we do agree that the F.B.I.'s practice is subject to criticism and introduces opportunity for the assertion of doubt. Retention of the notes would foreclose many attempts to impeach F.B.I. agents' reports. Notwithstanding this, we think appellant is not entitled to relief because the notes in question do not fall within the statute.

In United States v. Johnson, 337 F.2d 180 (4 Cir. 1964), aff'd, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), this court was called upon to consider the effect of the destruction of F.B.I. notes. The notes destroyed there had been made by F.B.I. agents during interviews of a *defendant* and a *defense* witness. At trial the testimony of the agent and the parties interviewed as to the statements made during the interviews was sharply conflicting. The appellant there contended that destruction of the notes violated the Jencks Act. We rejected the contention on the ground that statements by other than government witnesses may not qualify as Jencks material, but we observed the ill-advised nature of the F.B.I.'s practice:

> Each time the problem has arisen the FBI has claimed that the notes were destroyed as part of FBI routine.

This is really not a satisfactory answer. Where the agent testifies to matter he claims not to be in the notes and the defendant insists on a different version, an issue arises which may not be satisfactorily resolved in the absence of the original notes. If the notes were available, they might confirm or refute one version or the other. One of the purposes of both the Jencks decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses. Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959); United States v. Wenzel, 311 F.2d 164, 171 (4th Cir. 1962). The destruction of interview notes does not advance this purpose. Of course, a district court may find as a fact that the notes were not a substantially verbatim record, or that they were accurately copied into a report and then destroyed in good faith, but the necessity for inquiries along this line can be avoided by the preservation of notes until after the trial. Eliminating uncertainty may serve the interest of the Government no less than the defendant. 337 F.2d at 201–202.

In the instant case, the notes recorded a conversation between a government witness and appellant. These notes therefore could qualify as Jencks material if they satisfy the requirements set out in 18 U.S.C. § 3500(e) (2). That section provides:

> (e) The term "statement," * * * in relation to any witness called by the United States, means—
>
> * * * * * *
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a *substantially verbatim recital of an oral statement* made by said witness *to an agent of the Government* and recorded contemporaneously with the making of such oral statement. (Emphasis added.)

Agent Cobb testified that the notes did not contain a verbatim statement of the conversation between Ferrara and appellant, and nothing in the record suggests the contrary. A serious question arises therefore as to whether the notes were a "substantially verbatim recital of an oral statement" made by Ferrara. Furthermore, the cited provision requires that a Jencks statement be made "to an agent of the Government." Although Ferrara was aware that Agents Faulkner and Cobb were listening, it is fair to say that his conversation was directed to the appellant, who of course is not a government agent. For these reasons, we conclude that the notes destroyed were not subject to demand under the Act.

IV. *The Failure to Sequester Agent Cobb*

[16] At the beginning of trial, counsel for appellant moved that all witnesses be excluded from the courtroom until called to testify. The Government opposed the motion with respect to Agent Cobb on the ground that it was customary practice for the agent in charge of the investigation to remain at the counsel table to assist the prosecuting attorneys in presenting their case. The District Court granted the appellant's motion as to every witness except Agent Cobb.

The Government then began putting on its case. Ferrara testified first, followed by Agent Faulkner, not by Cobb who was already in the courtroom. Appellant contends that the District Court abused its discretion in permitting Faulkner to testify in Cobb's presence before the latter testified. He suggests that the procedure followed deprived him of a fair trial because it eliminated the possibility of serious discrepancies in the "cornerstone" testimony of the two agents.

This court has repeatedly rejected the contention now urged by appellant. United States v. Adams, 376 F.2d 824 (4 Cir. 1967); Schoppel v. United States, 270 F.2d 413 (4 Cir. 1959); Laird v. United States, 252 F.2d 121 (4 Cir.

1958.) Only if prejudice were shown would the District Court's action be set aside. Here the appellant suggests only the possibility of impropriety on Agent Cobb's part. Under the circumstances, we see no reason to depart from our earlier holdings.

V. *Sufficiency of the Evidence*

[17] Missler's final assignment of error is that the Government's evidence, even when viewed in the light most favorable to the prosecution, did not prove commission of the offense.[7] The contention is advanced that no "endeavor" within the meaning of the statute was proven because Ferrara made no attempt on O'Keefe's life and had no intention of doing so. Thus, it is argued, a "solicitation" or "preparation for an endeavor" was proven, but not an "endeavor."

The Supreme Court's decisions in United States v. Russell, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921), and Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966), foreclose this argument. In both cases the Court rejected the contention that the defendant's improper conduct must be successful in achieving the forbidden objective in order to fall within the statute's proscription. There can be no question that a person "endeavors" to obstruct justice when he arranges to have a prospective government witness murdered.

For the reasons stated, we conclude that appellant's trial was free of prejudicial error and the judgment of the District Court is accordingly

Affirmed.

7. The statute, 18 U.S.C. § 1503, provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, *endeavors* to influence, intimidate, or impede any witness, in any court of the United States • • • in the discharge of his duty • • • or corruptly or by threats or force • • • influences, obstructs or impedes, or *endeavors* to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769. (Emphasis added.)

ASSOCIATED TABULATING SERVICES, INC., Plaintiff-Appellee,

v.

OLYMPIC LIFE INSURANCE COMPANY, Defendant-Appellant.

No. 26949.

United States Court of Appeals
Fifth Circuit.

Aug. 14, 1969.

Rehearing Denied Sept. 9, 1969.

Action by computer company for alleged breach of contract by insurance company. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., entered judgment for computer company and insurance company appealed. The Court of Appeals, Coleman, Circuit Judge, held that no contract existed between computer company and insurance company which sent data processing forms to computer company and accepted data processing work done by computer company between June 1 and July 16 after preliminary negotiations in which officers of computer company stated that they would amortize initial "set-up" costs over five-year period and both parties agreed to enter into formal contract but no such contract was ever written.

Affirmed in part, reversed in part and remanded.

1. Contracts ⇐29

Where record consists altogether of undisputed facts and circumstances, question of whether parties entered into binding contract is one of law, not of fact.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,757.

United States of America, Appellee,

versus

Earl Missler, Appellant.

O R D E R

After consideration of appellant's "Petition for Rehearing and/or Withdrawal, Clarification or Modification of Opinion," by unanimous vote of the court, the petition is denied.

Simon E. Sobeloff
United States Circuit Judge

FILED
OCT 10 1969
SAMUEL W. PHILLIPS
CLERK

A True Copy, T e s t e:
Samuel W. Phillips, Clerk
By [illegible]
Deputy Clerk

Constitutional and Statutory Provisions Involved

Constitution of the United States - Amendment , Article IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States - Amendment, Article V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States - Amendment, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Code - Title 18:

Section 3500. Demands for production of statements and reports of witnesses.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

" (e) The term 'statement' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means ---

'(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

'(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

Section 1503. Influencing or injuring officer, juror or witness generally.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or

other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than five years, or both.
June 25, 1948, c. 645, 62 Stat. 769."

INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA)
) Criminal No. 27,917
v.) (Obstruction of Justice,
) T.18, U.S.C., §1503.)
EARL MISSLER)

The Grand Jury for the District of Maryland charges:

That from on or about the 2nd of January, 1968, to and including on or about the 9th day of January, 1968, in the State and District of Maryland,

EARL MISSLER

did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Maryland in that the said Earl Missler: (a) did hire one Vincent Ferrara to cause the murder of or serious injury to one Richard O'Keefe; (b) did pay to Vincent Ferrara on or about January 2, 1968, the sum of $1,500.00 and on or about January 9, 1968, the sum of $500.00, and on January 9, 1968, did

undertake and promise to pay the said Vincent Ferrara an additional $2,000.00, said payments and promise for the purpose of hiring Ferrara to cause the murder of or serious injury to the said Richard O'Keefe. The aforesaid conduct by the Defendant Missler was with the intention and for the express purpose of preventing said Richard O'Keefe from testifying against the said Earl Missler in Criminal Action Number 27,887 now pending in the United States District Court for the District of Maryland.

T. 18, U.S.C., § 1503.

Stephen H. Sachs
United States Attorney

A TRUE BILL:

Foreman

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 913

EARL MISSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the District of Maryland, petitioner was convicted of violating 18 U.S.C. 1503, the federal obstruction of justice statute, by hiring and paying money to one Vincent Ferrara to bring about the murder of Richard O'Keefe, a prospective government witness at petitioner's then pending trial on charges of hijacking from an interstate shipment. The court of appeals affirmed (414 F. 2d 1293; Pet. App. 1a–14a).

The pertinent facts are not in dispute, and are set forth in detail in the opinion below (Pet. App. 3a–4a). On December 27, 1967, while on bond following his indictment in the hijacking case, petitioner met

with Ferrara for the purpose of discussing the elimination of O'Keefe, a prospective witness at the hijacking trial. Petitioner agreed to pay Ferrara $4,000 to have O'Keefe killed. During the first week of January 1968, he paid Ferrara $1,500. On January 9, 1968, Ferrara telephoned the FBI and informed them about the O'Keefe "contract." He also told agents Faulkner and Cobb that he expected petitioner to visit him that morning for the purpose of making an additional payment, and he invited them to come to his home. The agents reported the call to the United States Attorney, asking for instructions and stating that the meeting was expected to take place within fifteen or twenty minutes. The United States Attorney advised them to accept Ferrara's invitation. Accordingly, the agents went to Ferrara's home and secreted themselves at the head of the stairs leading to the second floor, where they heard petitioner make incriminating statements about the agreement to have O'Keefe murdered. The agents—as well as Ferrara—testified to this conversation at trial.

1. Petitioner, apparently rejecting any distinction between overhearing of a conversation by the naked ear and the use of government-furnished electronic equipment to transmit or record it, contends that the present case is controlled by the outcome of *United States* v. *White*, No. 46, this Term, certiorari granted, 394 U.S. 957. The court below correctly concluded, however (Pet. App. 9a–10a & n. 6), that this case is distinguishable from *White*, since the only conversation which the government overheard took place in the home

of the informant. See *Lewis* v. *United States*, 385 U.S. 206. The court of appeals—without deciding the question presented in *White*, whether the warrant requirement of *Katz* v. *United States*, 389 U.S. 347, is applicable to consensual eavesdropping by electronic instrument (*i.e.*, whether *Katz* effectively overruled *Lopez* v. *United States*, 373 U.S. 427, and *On Lee* v. *United States*, 343 U.S. 747)—held that *Katz* at the least would not protect a person who entered the *home of another* to transact illegal business from having his conversation overheard by government agents present with the consent of the owner of the premises. This ruling was correct. See *Alderman* v. *United States*, 394 U.S. 165, 179 n. 11.[1]

2. Petitioner cites *Massiah* v. *United States*, 377 U.S. 201, and *Beatty* v. *United States*, 389 U.S. 45, in support of his claim that his Sixth Amendment right to counsel was infringed by the government's overhearing of his conversation since it took place following his indictment in the hijacking case. As the court below held, however (Pet. App. 10a–11a), *Massiah* and *Beatty* were distinguishable because the investigation in each of those cases was designed to acquire further evidence of the crime with which the defendant was already charged, and the defendant's statements were introduced at his trial on that charge. Here, on the other hand, the United States Attorney

[1] On the facts of this case, moreover, where the agents learned of the informer's impending meeting with petitioner only minutes before the time when it was to occur, there was no effective opportunity to secure a prior judicial approval to listen in on the conversation. See *Warden* v. *Hayden*, 387 U.S. 294.

authorized the overhearing solely to corroborate an allegation of petitioner's involvement in a different federal crime—obstruction of justice through the elimination of a prospective government witness—and the issue is the admissibility of evidence of the overheard conversation in the obstruction trial. It was entirely proper for the agents to accept Ferrara's invitation to discover whether his allegation of the planned murder was accurate. A defendant's indictment on one charge cannot have the effect asserted by petitioner of insulating him from the use, at a trial on another charge, of information obtained by subsequent investigation of his complicity in that separate offense. See *Hoffa* v. *United States,* 385 U.S. 293, 304–310. To be sure, the crimes here (as in *Hoffa*) were related, in that proof of petitioner's scheme to murder O'Keefe would normally be admissible at his trial on the hijacking charge to show guilt. But, whatever the applicability of *Massiah* to the hijacking case,[2] it did not forbid introduction of the agents' testimony in the trial on the present offense, in respect of which the overhearing was prior to the indictment or any "critical stage".

3. Petitioner also asserts alleged violations of the Jencks Act (18 U.S.C. 3500) by the government at trial. These contentions are answered in the opinion of the court below, on which we rely (See Pet. App. 11a–13a). Even if the "notes" of agents Faulkner and Cobb may fairly be attributable to the agents and not

[2] This appears to be a moot question, since petitioner states that he was acquitted of the hijacking offense (Pet. 12).

to Ferrara and petitioner, the destruction of the notes did not require a new trial. These were sketchy notes which, in accord with customary FBI practice, were destroyed after the agents had prepared a formal report of the conversation and after the agents had satisfied themselves that this "report was a full and accurate statement of the days events * * *" (Pet. App. 12a). The report was turned over to defense counsel at trial. This Court has consistently denied certiorari in such circumstances. See, *e.g., United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2), certiorari denied, 380 U.S. 978. There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of ceritorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970